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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6855

BOBBY HARDWICK,

Petitioner,

v.

MAMIE REESE, CHAIRWOMAN, AND MEMBERS OF THE STATE BOARD OF PARDONS AND PAROLES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respectfully submitted,

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QUESTION PRESENTED

Do Due Process rights attach to a parole consideration proceeding which does not involve either a loss of liberty or a property right if parole is subsequently denied?

STATEMENT OF THE CASE

Bobby Hardwick was tried and found guilty by a jury in the Superior Court of Richmond County, Georgia, on an indictment charging him with armed robbery and aggravated assault. Hardwick received two concurrent life sentences and two ten-year sentences which run consecutively to the life sentences. These offenses arose from a 1969 robbery of the Citizens and Southern Bank in August, Georgia. See Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977). Petitioner Hardwick first became eligible for a parole consideration in December of 1976. [1/] Petitioner Hardwick was denied a parole at that time. Following the denial of his first consideration for parole, Petitioner Hardwick filed a complaint pursuant to 42 U.S.C. § 1983 against Mrs. Mamie Reese, Chairwoman of the Georgia Board of Pardons and Paroles and the other members of the Board of Pardons and Paroles, alleging a denial of his civil and constitutional rights concerning the parole mechanism in Georgia. Respondents in answering this complaint filed a Motion to Dismiss or in the alternative Motion for Summary Judgment with the district court urging the court to dismiss the complaint on the basis that due process rights as argued by the Petitioner do not attach themselves to parole consideration proceedings. The district court on October 7, 1977 agreed with the Respondents' position and dismissed the complaint for failure to state a claim. Thereafter, an appeal was taken to the United States Court of Appeals for the Fifth Circuit. In an unpublished per curiam opinion, the Fifth Circuit Court of Appeals affirmed the decision of the district court on May 3, 1978.

1/ Georgia Code Ann. § 77-525 provides that inmates serving sentences of twenty-one years or more shall become eligible for parole consideration upon completion of the service of seven years.

On June 5, 1978 a petition for a writ of certiorari was filed with this Court by Hardwick in order to review the decision of the United States Court of Appeals for the Fifth Circuit (No. 77-3262, which affirmed the decision of the district court). Respondent was directed to respond on August 17, 1978.

REASON FOR NOT GRANTING WRIT

DUE PROCESS RIGHTS DO NOT ATTACH THEMSELVES TO PAROLE ELIGIBILITY CONSIDERATIONS.

In his petition for a writ of certiorari to this Court, Bobby Hardwick seeks a review of the decision of the United States Court of Appeals for the Fifth Circuit affirming a district court decision that due process rights do not pertain to parole eligibility proceedings. Specifically, Hardwick's complaint brought pursuant to 42 U.S.C. § 1983 is a broadly based attack on the parole mechanism in Georgia. The Petitioner contends that at the time he was eligible for parole he was denied due process when the Parole Board considered the nature of the offense which led to his incarceration; did not give him a hearing before the Board; refused to permit him to examine his parole file; that the actions of the Parole Board are racially discriminatory; and, that the Parole Board in denying him a parole failed to take into consideration all factors, such as the various correspondence courses which he had enrolled in and completed since the time of his initial incarceration. Thus, the complaint which was first filed with the district court and subsequently reviewed by the Court of Appeals does not challenge Hardwick's conditions of confinement, but rather the duration of his confinement on the basis that if the Georgia State Board of Pardons and Paroles had done what Hardwick considered they should have done, he would have been released by having been granted a parole. 2/

2/ In granting the Respondents' Motion to Dismiss the district court decided in favor of the Respondents in terms of its lack of merit, that is the failure of the complaint to state a claim. However, it is apparent that the district court could have dismissed the complaint on the basis of this Court's holding in Preiser v. Rodriguez, 411 U.S. 475 (1973), for the failure of the petitioner to exhaust state remedies since he was seeking an early release which is in the nature of habeas corpus.

In his application for a petition for a writ of certiorari Hardwick is asking this Court to determine whether due process rights attach to parole consideration determinations. It is Petitioner Hardwick's belief that certain due process rights do attach for an individual who is being considered for parole release. However, the weight of authority is against Petitioner Hardwick, in that the various district courts and Circuit Courts of Appeals have consistently held that due process rights are not involved in parole eligibility considerations. Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977) [reversing 399 F.Supp. 309 and 401 F.Supp. 1371]: Cruz v. Skelton, 543 F.2d 86, 88-91 (5th Cir. 1976); Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976). These decisions and numerous other holdings that procedural due process rights are not applicable to parole consideration proceedings take into account two concepts: (1) the right of a state prisoner to a parole is not one of the rights protected by the federal consititution, that is, parole is a matter of legislative grace and not constitutional right, Dunn v. California Department of Corrections, 401 F.2d 340 (9th Cir. 1968); Bricker v. Michigan Parole Board, 405 F.Supp. 1340, 1343 (E.D. Mich. 1975); and (2) that in a parole consideration proceeding there is not "liberty" at stake to be protected by due process. See Bradford v. Weinstein, 519 F.2d 728, 732 (4th Cir. 1974). Consequently, judicial review of the denial of a parole is not available absent flagrant violations, unless the actions of the Parole Board in denying a parole are arbitrary and capricious. See Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978); United States v. Norton, 539 F.2d 1082 (5th Cir. 1976), cert. den., ____ U.S. ____, 97 S.Ct. 1129 (1976). In a parole release proceeding or a parole consideration proceeding one is talking about the privilege of being released from incarceration. Due process considerations or

safeguards attach to proceedings which could lead to incarceration of one presently free, but not to parole consideration proceedings. There is no loss of liberty in the denial of a parole because one is not constitutionally entitled to a parole, and the denial of a parole does not involve any "grievous loss of liberty." See Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976).

Due process is a flexible concept, and is not a fixed panoply of rights.

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental actions." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

Due process basically involves a balancing to arrive at what is substantially fair and just. See Wolff v. McDonnell, 418 U.S. 539 (1974). However, due process considerations only concern themselves with the deprivation of those interests which are encircled by the Fourteenth Amendment's protection.

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to show some kind of prior hearing is paramount. But, the range of interest protected by procedural due process is not infinite." Board of Regents v. Roth, 408 U.S. 564, 569-570 (1970).

Accordingly, the question to be answered is whether parole eligibility is a "liberty" to be protected by due process. Petitioner Hardwick in support of his position relies upon Morrisey v. Brewer, 408 U.S. 471 (1972), Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Wolff v. McDonnell, supra. Each of these cases are readily distinguishable from the matter presented in this application for a writ of certiorari. Morrisey v. Brewer, supra, dealt with a parole revocation hearing which directly involved a loss of liberty. Likewise, in Gagnon v. Scarpelli, the loss of liberty to be protected was the revocation of a period of probation. In Wolff v. McDonnell, supra., the liberty to be protected was not as obvious as in Morrisey and Gagnon, since in Wolff, this court was concerned with examining disciplinary proceedings within a prison, which would result in the loss of the limited liberty a prisoner has when he is incarcerated by being placed under more onerous conditions of confinement as the result of a disciplinary hearing. Sub judice, there is no loss of liberty to be protected at a parole consideration proceeding. The denial of a parole does not make the conditions of confinement any more onerous, nor does the denial of a parole take away a liberty which had previously been afforded to the inmate. To put it another way, a parole eligibility hearing is not an adversary matter; its purpose is not to determine whether a prisoner has committed a crime, but to determine whether the prisoner should be released from custody. McArthur v. United States Board of Paroles, 434 F.Supp. 163 (D.C. Ind. 1976). See also Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970), cert. den., 400 U.S. 1023 (1971).

Consequently, a prospective parolee is not entitled to access and review of all of the information contained in his

file with the Parole Board. Franklin v. Shields, supra; Kraft v. Texas Board of Pardons and Paroles, 550 F.2d 1054 (5th Cir. 1977). Also without merit is the Petitioner's claim that the Parole Board is not entitled to deny parole on the basis of its considering the nature of the offense, or the individual's previous criminal record. Johnson v. Wells, supra; Thompkins v. United States Board of Paroles, 427 F.2d 222 (5th Cir. 1970). Similarily, an inmate is not constitutionally entitled to a hearing before the Parole Board, Willey v. United States Board of Paroles, 380 F.Supp. 1194 (D.C. Pa. 1974), nor is he entitled to have counsel speak on his behalf. Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974). Lastly, the district court was correct in dismissing Hardwick's complaint which contained an allegation that parole considerations in Georgia were racially motivated. The denial of a parole will not be reversed on the basis of an inmate's conclusory allegation such as his contention that racial considerations motivate parole release. See Sherman v. Yakahi, 549 F.2d 1287, 1290-91 (9th Cir. 1977); Forrester v. California Adult Authority, 510 F.2d 58, 61-62 (8th Cir. 1975); Ellingburg v. King, 490 F.2d 1270, 1271 (8th Cir. 1974).

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner Hardwick.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. Stephen Parker, Attorney of Record for the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of the foregoing Brief for Respondents in Opposition upon the Petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage thereon to Bobby Hardwick, Georgia Diagnostic and Classification Center, P. O. Box 3877, Jackson, Georgia, 30233.

This 1ST day of September, 1978.

G. Stephen Parker

G. STEPHEN PARKER

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